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BEFORE THE FEDERAL ELECTION COMMISSION

2011 MAY 10 A 10:19

In the Matter of)
)
MUR 6383)
OHIO NEWS ORGANIZATION)
THE AKRON BEACON JOURNAL)
THE TOLEDO BLADE COMPANY)
THE (CANTON) REPOSITORY)
THE (CLEVELAND) PLAIN DEALER)
THE COLUMBUS DISPATCH)
THE CINCINNATI ENQUIRER)
THE DAYTON DAILY NEWS)
THE (YOUNGSTOWN) VINDICATOR)
FISHER FOR OHIO AND JAN ROLLER,)
AS TREASURER)
PORTMAN FOR SENATE COMMITTEE AND)
NATALIE K. BAUER, AS TREASURER)

CASE CLOSURE UNDER THE
ENFORCEMENT PRIORITY
SYSTEM

GENERAL COUNSEL'S REPORT

Under the Enforcement Priority System ("EPS"), the Commission uses formal
scoring criteria to allocate its resources and decide which cases to pursue. These criteria
include, but are not limited to, an assessment of (1) the gravity of the alleged violation, both
with respect to the type of activity and the amount in violation, (2) the apparent impact the
alleged violation may have had on the electoral process, (3) the legal complexity of issues
raised in the case, (4) recent trends in potential violations of the Federal Election Campaign
Act of 1971, as amended ("Act"), and (5) development of the law with respect to certain
subject matters. It is the Commission's policy that pursuing low-rated matters, compared to
other higher-rated matters on the Enforcement docket, warrants the exercise of its
prosecutorial discretion to dismiss certain cases, or in certain cases where there are no facts
to support the allegations, to make no reason to believe findings. For the reasons set forth
below, this Office recommends that the Commission make no reason to believe findings in
MUR 6383.

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1 In this matter, Dan La Botz filed a complaint on September 21, 2010 in which he
2 stated that he was the 2010 Socialist Party candidate for the United States Senate from Ohio
3 and, as such, was eligible to have his name appear on the upcoming general election ballot.
4 Nonetheless, according to the complainant, he was improperly excluded from a series of
5 three televised debates that were scheduled to be held in October 2010 between the major
6 parties' senatorial candidates, Democrat Lee Fisher and Republican Rob Portman,¹ which
7 were sponsored by the Ohio Newspaper Organization ("OHNO"),² a partnership consisting of
8 eight incorporated Ohio newspapers.³ Specifically, the complainant asserts that OHNO failed
9 to inform him of the scheduled debates, which were announced on September 1, 2010 and,
10 when he contacted OHNO, was told that he had not met the organization's debate-
11 participation criteria, which allegedly included a candidate's "front-runner status," based on
12 factors such as "Quinnipiac⁴ and party polling, fundraising reports, [and] party affiliation."
13 The complainant maintains that such standards are partisan, non-objective, and were not pre-
14 established, and therefore violated 11 C.F.R. § 110.13(c), which requires debate staging
15 organizations to use pre-established, objective criteria. As a result, the complainant
16 concludes the costs of the debates constituted an illegal in-kind corporate contribution, in
17 violation of 2 U.S.C. § 441b(a), by the members of OHNO to Fisher for Ohio and Jan Røller,

¹ Mr. Fisher and Mr. Portman won their respective party primaries on May 4, 2010.

² The complainant uses the acronym "ONO."

³ According to the complainant, OHNO member newspapers are the Toledo Blade, the (Canton) Repository, the (Cleveland) Plain Dealer, the Cleveland Dispatch, the Cincinnati Enquirer, the Dayton Daily News, the Akron Beacon Journal, and the (Youngstown) Vindicator.

⁴ It appears that the phrase "Quinnipiac polling" refers to polls conducted by Quinnipiac University, located in Hamden, Connecticut. According to the university's website, "the independent Quinnipiac University Poll regularly surveys residents in Connecticut, Florida, New York, New Jersey, Ohio, Pennsylvania and nationwide about political races, state and national elections, and issues of public concern, such as schools, taxes, transportation, municipal services and the environment." See <http://www.quinnipiac.edu/x271.xml>.

1 in her official capacity as treasurer ("Fisher Committee"), and Portman for Senate Committee
2 and Natalie K. Bauer, in her official capacity as treasurer ("Portman Committee").

3 Responses were filed by OHNO, on behalf of itself and its eight member newspapers,
4 and by the Fisher and Portman Committees, respectively. In its response, OHNO first asserts
5 that it and its members, as "broadcasters" and "*bona fide* newspapers," qualify as debate
6 "staging organizations," and are not owned by any political parties, as set forth in 11 C.F.R.
7 § 110.13(a)(1). Second, OHNO points out that it sponsored debates in both Ohio's 2010
8 senatorial and gubernatorial races, and in both sets of debates, "given the limited time
9 available to hold the debates and the anticipated large field of candidates," it decided to
10 extend invitations only to the two frontrunners in each race.

11 With respect to the Senate race, OHNO asserts that it reviewed polls taken during
12 2009 and 2010, prior to the debates, and determined that Messrs. Fisher and Portman
13 received by far the highest approval polling numbers, ranging between 27 and 42 percent. In
14 contrast, OHNO states that the approval polling numbers for the combined category of
15 senatorial candidates labeled "someone else," including Mr. La Botz and two other non-
16 major party senatorial candidates, totaled no more than 1 percent. OHNO states that, had a
17 candidate other than Mr. Fisher or Mr. Portman been a frontrunner, that individual would
18 have been issued a debate invitation. OHNO concludes by stating that its debate criteria
19 were both "pre-existing" and "objective," as required by section 110.13(c). Appended to
20 OHNO's response is a sworn affidavit from Benjamin J. Marrison, editor of member
21 newspaper The Columbus Dispatch, reiterating the information set forth in OHNO's
22 response, including the statement that the organization first decided to invite only the two
23 leading senatorial candidates and subsequently selected Messrs. Fisher and Portman.

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1 In addition, both the Fisher Committee and the Portman Committee filed responses.
2 The Fisher Committee maintains that OHNO's selection process was valid in light of the
3 leeway afforded to media entities for debate staging and the fact that Mr. La Botz could only
4 show marginal electoral support. Furthermore, both the Fisher and Portman Committees note
5 that the Commission's debate staging regulations place the burden of compliance with the
6 debate staging organization, as opposed to the debate participants; for this reason, they ask
7 that the Commission dismiss the complaint as to them.

8 The Act prohibits corporate contributions in connection with federal elections.
9 2 U.S.C. § 441b(a). An exception to the prohibition on corporate contributions is provided
10 in 2 U.S.C. § 431(9)(B)(ii), which exempts from the definition of "expenditure" "nonpartisan
11 activity designed to encourage individuals to vote or register to vote." This provision has
12 been construed to exclude "funds provided to defray costs incurred in staging candidate
13 debates in accordance with the provisions of 11 C.F.R. §§ 110.13 and 114.4(f)" from the
14 definition of "contribution" and "expenditure," respectively. See 11 C.F.R. §§ 100.92 and
15 100.154. Section 110.13(a)(2), in turn, permits "[b]roadcasters (including a cable television
16 operator, programmer or producer), *bona fide* newspapers," as well as "magazines and other
17 periodical publications" to stage candidate debates. The regulations leave the structure of the
18 debate to the discretion of the staging organization, provided that the debate includes at least
19 two candidates, the organization does not arrange the debates in a manner that promotes or
20 advances one candidate over another, and the criteria for candidate selection are objective
21 and pre-established under 11 C.F.R. §§ 110.13(b)-(c).

22 As *bona fide* news organizations, it appears that ONHO and its members are qualified
23 debate staging entities, pursuant to section 110.13(a) and, although neither the complainant
24 nor the respondents address this issue, it appears that the debates sponsored by OHNO were

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not structured to promote either candidate above the other, *see* 11 C.F.R. § 110.13(b).

Further, it appears that OHNO's debate selection criteria were pre-existing and objective, *see* 11 C.F.R. § 110.13(c), and consistent with a number of different criteria the Commission has previously found to have been acceptably "objective," including percentage of votes by a candidate received in a previous election; the level of campaign activity by the candidate; his or her fundraising ability and/or standing in the polls; and eligibility for ballot access. *See* MURs 4956, 4962, and 4963 (Gore 2000, *et al.*); MUR 5395 (Dow Jones, *et al.*); and MUR 5650 (University of Arizona).

Finally, with respect to the debate participants' front-runner status and the complainant's apparent lack thereof, we independently note that Messrs. Fisher and Portman established campaign committees in early 2009 (February 24, 2009 and January 22, 2009, respectively), and subsequently filed financial disclosure reports on a regular basis. In contrast, at the time he filed his complaint, Mr. La Botz had filed a Statement of Candidacy, but had not filed a Statement of Organization establishing a campaign committee. In fact, Mr. La Botz did not formally set up a campaign committee until October 9, 2010. The La Botz Committee subsequently filed only one financial disclosure report, the 2010 October Quarterly, prior to the 2010 general election.

Thus, it appears that the senatorial debates sponsored by OHNO complied with 11 C.F.R. § 110.13 and, therefore, this Office recommends that the Commission find no reason to believe that the Ohio Newspaper Organization, its members, the Toledo Blade, the (Canton) Repository, the (Cleveland) Plain Dealer, the Cleveland Dispatch, the Cincinnati Enquirer, the Dayton Daily News, the Akron Beacon Journal, and the (Youngstown)

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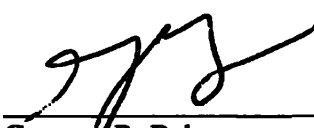
Vindicator, Fisher for Ohio and Jan Roller, in her official capacity as treasurer, and Portman for Senate Committee and Natalie K. Bauer, in her official capacity as treasurer, violated 2 U.S.C. § 441b(a).

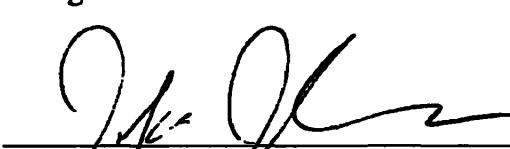
RECOMMENDATIONS


1. Find no reason to believe that the following respondents violated 2 U.S.C. § 441b(a): the Ohio Newspaper Organization, the Toledo Blade, the (Canton) Repository, the (Cleveland) Plain Dealer, the Cleveland Dispatch, the Cincinnati Enquirer, the Dayton Daily News, the Akron Beacon Journal, and the (Youngstown) Vindicator, Fisher for Ohio and Jan Roller, in her official capacity as treasurer, and Portman for Senate Committee and Natalie K. Bauer, in her official capacity as treasurer; and
2. Close the file and send the appropriate letters.

Christopher Hughey
Acting General Counsel

5/3/11
Date

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